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THE UNITED STATES PATENT AND TRADEMARK OFFICE

Serial No.: 10/812,749
Applicant: Robert J. Simmons
Filed: March 29, 2004
Group #: 3652
Examiner: Gina M. Lupino

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Docket No: J-BSIM.1013
Customer No: 56703
For: Building-Erection Structural Member Transporter

02/22/2008 HMARZI1 00000054 10812749

MS Appeal
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

01 FC:2402

255.00 OP

Sir:

APPEAL BRIEF UNDER 37 C.F.R. §41.37

In support of the appeal to the final rejection of the claims in the above-referenced application, dated November 1, 2007, and the Notice of Appeal, filed January 28, 2008, Appellants respectfully submit the following Appeal Brief.

1. Statement of the Real Party in Interest under 37 C.F.R. §41.37 (c)(1)(i)

The real party in interest is Robert J. Simmons, having a place of business in Hayward, California.

2. Status of Related Appeals and Interferences under 37 C.F.R. §41.37(c)(1)(ii).

There are no related Appeals or Interferences.

3. Status of all Claims under 37 C.F.R. §41.37(c)(1)(iii).

Claims 1, 2, 5, and 7-9 are pending. Claims 3, 4, and 6 have been cancelled. All claims stand rejected. All claims pending in the Application are hereby Appealed.

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Figs 1-5 1/8-9/18) for handling and promoting installation-site delivery of building-frame beam components (12 Figs 1 & 2 4/10-15) during the construction of a plural story structural building frame (16 Fig 2 4/15-21), said transporter having a fork-receiving side (10A Figs 1-5 7/11-20) and an opposite, load-lateral-delivery side (10B Figs 1-5 7/11-20), and comprising

a cage-like worker occupancy volume (10a Figs 1-5 5/3-12) fully occupying the inside of a worker-carrying cage-like structure defined by substantially horizontal floor structure (10b Figs 1, 3, 4 5/3-12) which is joined to substantially upwardly extending, open, and at least partially floor-perimeter wall structure (10c Figs 1-5 5/3-12), and

disposed substantially directly overhead said floor and wall structures, and above said worker occupancy volume (10a Figs 1-5 5/3-12), generally upwardly facing, open, horizontal, elongate, load-support deck structure (10d Figs 1-5 5/3-12) consisting of a pair of spaced apart deck structure elements (34 Figs 1-5 6/14-22) which are supported by a pair of spaced apart upright supports (32 Figs 1-3 6/13-22), the deck structure (10d Figs 1-5 5/3-12) having one end (38 Figs 1-5 6/18-7/10) adjacent the mentioned load-lateral-delivery side, and an opposite end defined by upwardly extending load-stop riser structure (36 Figs 1-5 6/17-18), said deck-structure being adapted for the overhead supporting and load-carrying of all elongate building-frame beam components (12 Figs 1 & 2 4/10-15) which are to be handled by the transporter, said deck structure (10d Figs 1-5 5/3-12) having an open framework which is open to the underlying worker occupancy volume (10a Figs 1-5 5/3-12) so as to accommodate load-handling personnel access, and to promote attended personnel assistance, by a worker stationed in said occupancy volume (10a Figs 1-5 5/3-12).

Claim 7. A machine-liftable and maneuverable, open cage-like load transporter (10

Figs 1-5 1/8-9/18) for handling and promoting installation-site delivery of building-frame beam components (12 Figs 1&2 4/10-15) during the construction of a plural story structural building frame (16 Fig 2 4/15-21), said transporter having a fork-receiving side (10A Figs 1-5 7/11-20) and an opposite, load-lateral-delivery side (10B Figs 1-5 7/11-20), and comprising

a worker occupancy space (10a Figs 1-5 5/3-12) fully occupying the inside of a worker-carrying cage-like structure, defined by substantially horizontal floor structure (10b Figs 1, 3, 4 5/3-12) extending over the entire horizontal expanse of the cage-like structure, which is joined to substantially upwardly extending, open, and at least partially floor-perimeter wall structure (10c Figs 1-5 5/3-12), and

disposed substantially directly overhead said floor and wall structures, and above said worker occupancy volume(10a Figs 1-5 5/3-12), generally upwardly facing, open, horizontal, elongate, load-support deck structure (10d Figs 1-5 5/3-12) having one end adjacent the mentioned load-lateral-delivery side (10B Figs 1-5 7/11-20), and an opposite end defined by upwardly extending load-stop riser structure (36 Figs 1-5 6/17-18), said deck-structure being adapted for the overhead supporting and load-carrying of all elongate building-frame beam components (12 Figs 1 & 2 4/10-15) which are to be handled by the transporter, said deck structure (10d Figs 1-5 5/3-12) having an open framework which is open to the underlying worker occupancy volume (10a Figs 1-5 5/3-12) so as to accommodate load-handling personnel access, and to promote attended personnel assistance, by a worker stationed in said occupancy volume (10a Figs 1-5 5/3-12).

6. Grounds of Rejection to be Reviewed on Appeal under 37 C.F.R. §41.37(c)(1)(vi)

Ground A: Claims 1 and 7 stand rejected under 35 U.S.C. § 103(a) as being

unpatentable over U.S. Patent No. 3,268,033 to Goodacre in view of U.S. Patent No. 5,644,111 to Cerny *et al.*.

Ground B: Claims 2, 5, 8 and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over '333 in view of '111 as applied to claims 1 and 7, and further in view of U.S. Patent No. 2,639,051 to Thomas.

7. Arguments under 37 C.F.R. § 41.37 (c)(1)(vii)

Ground A: Claims 1 and 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 3,268,033 to Goodacre in view of U.S. Patent No. 5,644,111 to Cerny *et al.*.

The Examiner has finally come to understand that '033 element 30 is part of a horizontal floor structure, which is really a pallet which is separable from the remainder of the structure. 31 is an operator platform which covers only a small portion of the horizontal expanse of the safety cage. An expanded metal roof 34/35 covers the safety cage, wherein a portion of the roof (34) slopes downwardly from a flat portion of the roof (35). Roof portion 34 covers, fully, the space allotted for a worker in the '033 structure. There is no teaching nor suggestion that 34/35 is used to support anything, other than the Examiner's bald assertion made in light of Applicant's teaching. The Examiner clearly ignores the plain language, and hence the teachings, of both the applied art and the claims.

Turning to the 35 U.S.C. § 103(a) rejection of claim 1, '033 does provide for a worker occupancy volume, but only above operator platform 31, thus the volume fully does not extend over the horizontal floor structure, but is limited to a small portion of the safety cage. Extending the worker occupancy volume to the full horizontal extend of the cage of '033 would

defeat the intended use of that device, as there would be no way to capture the pallet through the open bottom of the cage, as required by the plain, very simple, language of '033. If the Examiner insists that 30 and 31 comprise the claimed floor structure, then the load transporter does not meet the requirements of the claim, as there is nothing in '033 attached to 30, except the forks. The actual safety cage of '033 appears to be permanently attached to the lift truck mechanism, thus only the pallet may selectively be removed and captured. This difference alone is sufficient to render claim 1 allowable over the applied art. The Examiner contends, on Page 7 of the Final Office action, that the limitation of the volume does not extend over the entire floor is irrelevant. The Examiner is once again mistaken, as the claim requires that the cage-like structure is defined by the floor structure and the floor-perimeter wall structure. "Perimeter" mean extending about the periphery thereof, thus, the floor and volume must fully fill the floor-perimeter wall structure, and cannot be limited to a small portion thereof, as alleged by the Examiner. The Examiner's contention that '033 teaches a cage which fully extends over "this" floor is correct, but irrelevant, as it does not meet the clear limitations of the claims. The remainder of the Examiner's responses to Applicant's Arguments is a mere repetition of the erroneous reasons for rejecting the claims, and includes lengthy commentary on a fictitious structure created by the Examiner from the three references, which in no way meet the limitations of the claims now pending in this Application.

Continuing, claim 1 requires a load-support deck structure, which is directly overhead the floor and wall structures, and above the worker occupancy volume. The Examiner substitutes what appear to be an expanded metal roof of '033 for this recited structure, and, in the Final Office action, alleges that the supports (35, 114) for the expanded metal roof of '033 are equivalent to the spaced apart deck structure elements claimed by Applicant. There are several

problems with the Examiner's contentions: first, the roof 35 of '033 is not intended to carry loads; there is no way for an operator to handle a load carried on 35, which is required by the clear language of the claim, even with the inclusion of '033 elements 35, 114. The inclusion of the hatch of '111 does not help, as the claim requires that the load-support deck structure be upwardly facing, *open*, horizontal, *etc.* 35 of '033 is not open; the ceiling of '111 is not open, and includes only a small hatch. The Examiner would interpret this hatch to comprise a majority of the ceiling, which defies even the definition of "hatch" provided by the Examiner. The combination of '033 and '111 does not result in a "...generally upwardly facing, open, horizontal, elongate, load-support deck structure...." It should be noted that in past Office actions, the Examiner has identified '033 34/35 as the deck structure, and only now limits such to '033 element 35, which, if the Examiner is possibly correct about the worker occupancy volume, does not extend over such volume in any manner. As previously noted, if there is anything in '033 which is equivalent to the load-support deck, it is pallet 30, however, that structure is *below* the worker occupancy volume. The Examiner make a serious error in interpreting the well-established law, stating that the "...intended use must result in a structural difference, *etc.*" However, on page 9 of the Office action, it is the intended use of the *reference* which is being questioned - not of the invention. The Examiner must interpret the reference in light of the *teaching* of the reference, and the '033 reference teaches that the load is carried on pallet 30, not on the top of the cage. Carrying a load on the top of the cage of '033 is a fiction created by the Examiner, and is nowhere taught nor suggested in '033. Claim 1 is allowable for this reason alone.

Claim 1 requires that an end of the deck structure adjacent the opposite end (non-

load-delivery end) is defined by an upwardly extending load-stop riser structure. The Examiner has not identified any structure in '033 which allegedly teaches this structure. This is understandable, because there is nothing in '033, or any of the other cited and/or applied art, which is even remotely equivalent to the load-stop riser. In fact, a cursory review of the figures of '033 clearly shows that, if 35 is a deck structure, 34 slopes downwardly therefrom, thus promoting dislodgement of any item carried on 35, such that the carried item will fall off the rear side of the safety cage of '033.

Claim 1 also requires a "...deck structure having an open framework which is open to the underlying worker occupancy volume so as to accommodate load-handling personnel access, and to promote attended personnel assistance, by a worker stationed in said occupancy volume." Assuming that one may use the Examiner's claim construction, neither '033 nor '111 has anything equivalent to the deck structure, and even if 35 of '033 is such a deck structure, it is not "open to the underlying worker occupancy volume." '033 element 35, as previously noted, is taught to be formed of expanded metal decking, but does not meet the required limitations of the claim, which are "...open framework...." '111 has a solid closed ceiling with a hatch. This is not equivalent to "...an open framework which is open to the underlying worker occupancy volume so as to accommodate load-handling personnel access, and to promote attended personnel assistance, by a worker stationed in said occupancy volume." Any combination of '033 and '111 results in a hatch in 35, which does not meet the limitation of the claim. If a hatch is formed in 35, and the worker occupancy volume is on floor 31, how could a worker on 31 possibly maneuver a load carried on 35 through a hatch in 35 when '033 clearly teaches that the operator is located on 31, which is not under 35? One of ordinary skill in the art would easily recognize

that the construction of the safety cage of '033 is not intended to carry a load on 34/35, nor would the placement of a load on 34/35 constitute a safe manner of using the invention of '033. The Examiner's contention regarding this feature of '033 is simply not a reasonable interpretation or application of the art.

Finally, the claimed deck structure is nowhere shown in the applied or cited art. Claim 1 is allowable over the applied art because this last recited element of claim 1 is not present in the combined art. Clearly, claim 1, is allowable over the applied art, as there are at least four distinct elements of claim 1 not found in the combination of the applied art.

Claim 7 includes a limitation that horizontal floor structure extends over the entire horizontal expanse of the cage-like structure. The Examiner seems to believe that '033 teaches such a limitation, even though Applicant has repeatedly shown that the "floor" structure of '033, as defined by the Examiner, includes a removable pallet 30, which the Examiner intentionally misinterpreted as a floor, which is separated from the operator's cage by a gate. Claim 7 is clearly allowable over the applied art for this reason and for the reasons set forth in connection with claim 1.

Applicant acknowledges that the Examiner is entitled to give a broad interpretation to Applicant's claims during examination, and that the Examiner may reasonably interpret the prior art. The Examiner is not entitled to interpret the applied art in a manner contrary to the plain meaning of the words and illustrations in that art, nor may the Examiner make an unreasonable interpretation of the applied art in a manner which would not be done by one of ordinary skill in the art. The Examiner, in this case, has unreasonably interpreted the applied art, thereby making a fictionalized device which the Examiner states renders Applicant's invention

obvious. Such an interpretation will not be permitted, and the Board is encouraged to so state.

Ground B: Claims 2, 5, 8 and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over ‘333 in view of ‘111 as applied to claims 1 and 7, and further in view of U.S. Patent No. 2,639,051 to Thomas.

Claim 2 is allowable over the applied art because the claimed deployable lateral extension is, when extended outwardly, a substantially *co-planar extension* of the load-support deck structure. Giving the Examiner the benefit of the doubt for a moment, and assuming element 35 of ‘033 is a deck structure, and that the pallet stack unloader of ‘051 could somehow be combined therewith, the deployable lateral extension is then oriented at a near right angle to the load-support deck, and is clearly not a co-planar lateral extension thereof. While “substantially” allows some latitude in the precise orientation of the lateral extension, it does not provide for a 90° difference. A combination of ‘033 and ‘051 would more likely result in a structure which has the unloader of ‘051 positioned somewhere near pallet 30 of ‘033, which, as stated by the Examiner, is a part of the floor structure, and not part of the deck structure. Another deficiency in the Examiner’s combination is that the unloader of ‘051 is non-weight bearing, and is designed merely to push a load off of the lift truck forks. ‘051 col. 1, lines 13-51. The claimed structure requires a load-bearing lateral extension. Claim 2 is allowable over the applied art. The Examiner’s Response to Applicant’s Arguments in connection with this claim simply do not make logical sense, and simply ignores the plain meaning of the words of the claim.

Claim 5 requires that beam-like elements extending along the length of the transporter, or, as specifically set forth in the claim:

The transporter of claim 2 which is designed to handle generally T-

shaped beam components each including angularly intersecting and interconnected elongate cap and stem sub-components, and for this purpose *said deck structure includes at least a pair of elongate, laterally spaced beam-like elements whose long axes generally extend from, the transporter's said fork-receiving side toward its said load-lateral-delivery side*, which pair of beam-like elements is disposed to support the cap sub-component in such a T-shaped beam component with that cap sub-component's long axis extending generally transversely of the long axes of the beam-like elements in said pair and closely adjacent said load-stop riser structure, and said lateral extension includes an elongate beam-like cross-piece which, with the extension deployed and extending outwardly adjacent the transporter's said load-lateral-delivery side, is disposed to support the stem sub-component in such a T-shaped beam component with the long axis of that stem sub-component extending generally transversely relative to the long axis of said cross-piece.

The Examiner applies elements 35 of '033 as a load-support deck structure, and applies 36 of '033 as the beam-like element. As best determined from Fig. 5 of '033, 36 is a vertically extending element, which cannot possibly extend horizontally between the ends of the transporter. In the Response to Arguments, on page 10 of the Final Office Action, the Examiner asserts that there is no requirement that the elements extend along the length of the transporter. The Examiner has clearly not read the *italicized* language in the claim, as presented above. Claim 5 is allowable over the applied art.

Claims 8 and 9 are allowable for the reasons set forth in connection with claims 2 and 5.

Having shown that the applied art does not teach nor suggest the appellant's

invention as claimed, Appellants request that the Examiner's final rejection of these claims be reversed.

Customer Number

56703

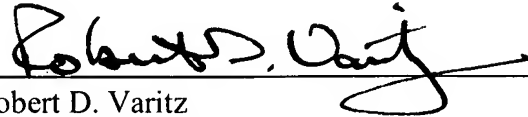
Respectfully Submitted,

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A handwritten signature in black ink, reading "Robert D. Varitz", written over a horizontal line.

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RDV:bd

**8. CLAIMS APPENDIX TO APPELLANT'S BRIEF under 37 C.F.R. § 41.37
(c)(1)(viii)**

The claims on appeal in the above-referenced application are reproduced hereinbelow as follows:

Claim 1. A machine-liftable and maneuverable, open cage-like load transporter for handling and promoting installation-site delivery of building-frame beam components during the construction of a plural story structural building frame, said transporter having a fork-receiving side and an opposite, load-lateral-delivery side, and comprising

 a cage-like worker occupancy volume fully occupying the inside of a worker-carrying cage-like structure defined by substantially horizontal floor structure which is joined to substantially upwardly extending, open, and at least partially floor-perimeter wall structure, and disposed substantially directly overhead said floor and wall structures, and above said worker occupancy volume, generally upwardly facing, open, horizontal, elongate, load-support deck structure consisting of a pair of spaced apart deck structure elements which are supported by a pair of spaced apart upright supports, the deck structure having one end adjacent the mentioned load-lateral-delivery side, and an opposite end defined by upwardly extending load-stop riser structure, said deck-structure being adapted for the overhead supporting and load-carrying of all elongate building-frame beam components which are to be handled by the transporter, said deck structure having an open framework which is open to the underlying worker occupancy volume so as to accommodate load-handling personnel access, and to promote attended personnel assistance, by a worker stationed in said occupancy volume.

Claim 2. The transporter of claim 1, which has a building-frame-facing side, and

wherein said deck structure is equipped adjacent its said one end with a deployable lateral extension which can be extended and withdrawn selectively and laterally outwardly from and inwardly toward said transporter's said load-lateral-delivery side to form, when extended outwardly, a substantially co-planar lateral extension of said load-support deck structure, thus to accommodate the delivery, toward a building frame installation site, of a transported and handled building-frame beam component.

Claims 3 and 4. CANCELLED

Claim 5. The transporter of claim 2 which is designed to handle generally T-shaped beam components each including angularly intersecting and interconnected elongate cap and stem sub-components, and for this purpose said deck structure includes at least a pair of elongate, laterally spaced beam-like elements whose long axes generally extend from, the transporter's said fork-receiving side toward its said load-lateral-delivery side, which pair of beam-like elements is disposed to support the cap sub-component in such a T-shaped beam component with that cap sub-component's long axis extending generally transversely of the long axes of the beam-like elements in said pair and closely adjacent said load-stop riser structure, and said lateral extension includes an elongate beam-like cross-piece which, with the extension deployed and extending outwardly adjacent the transporter's said load-lateral-delivery side, is disposed to support the stem sub-component in such a T-shaped beam component with the long axis of that stem sub-component extending generally transversely relative to the long axis of said cross-piece.

CLAIM 6. CANCELLED

Claim 7. A machine-liftable and maneuverable, open cage-like load transporter for handling and promoting installation-site delivery of building-frame beam components during the construction of a plural story structural building frame, said transporter having a fork-receiving side and an opposite, load-lateral-delivery side, and comprising

a worker occupancy space fully occupying the inside of a worker-carrying cage-like structure, defined by substantially horizontal floor structure extending over the entire horizontal expanse of the cage-like structure, which is joined to substantially upwardly extending, open, and at least partially floor-perimeter wall structure, and

disposed substantially directly overhead said floor and wall structures, and above said worker occupancy volume, generally upwardly facing, open, horizontal, elongate, load-support deck structure having one end adjacent the mentioned load-lateral-delivery side, and an opposite end defined by upwardly extending load-stop riser structure, said deck-structure being adapted for the overhead supporting and load-carrying of all elongate building-frame beam components which are to be handled by the transporter, said deck structure having an open framework which is open to the underlying worker occupancy volume so as to accommodate load-handling personnel access, and to promote attended personnel assistance, by a worker stationed in said occupancy volume.

Claim 8. The transporter of claim 7, which has a building-frame-facing side, and

wherein said deck structure is equipped adjacent its said one end with a deployable lateral extension which can be extended and withdrawn selectively and laterally outwardly from and inwardly toward said transporter's said load-lateral-delivery side to form, when extended outwardly, a substantially co-planar lateral extension of said load-support deck structure, thus to accommodate the delivery, toward a building frame installation site, of a transported and handled building-frame beam component.

Claim 9. The transporter of claim 7 which is designed to handle generally T-shaped beam components each including angularly intersecting and interconnected elongate cap and stem sub-components, and for this purpose said deck structure includes at least a pair of elongate, laterally spaced beam-like elements whose long axes generally extend from, the transporter's said fork-receiving side toward its said load-lateral-delivery side, which pair of beam-like elements is disposed to support the cap sub-component in such a T-shaped beam component with that cap sub-component's long axis extending generally transversely of the long axes of the beam-like elements in said pair and closely adjacent said load-stop riser structure, and said lateral extension includes an elongate beam-like cross-piece which, with the extension deployed and extending outwardly adjacent the transporter's said load-lateral-delivery side, is disposed to support the stem sub-component in such a T-shaped beam component with the long axis of that stem sub-component extending generally transversely relative to the long axis of said cross-piece.

9. EVIDENCE APPENDIX TO APPELLANT'S BRIEF under 37 C.F.R. § 41.37

(c)(1)(ix)

NONE

10. RELATED PROCEEDINGS APPENDIX TO APPELLANT'S BRIEF under 37

C.F.R. § 41.37 (c)(1)(x)

NONE

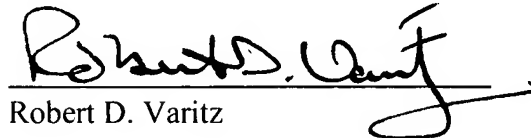
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Robert D. Varitz